In the Supreme Court of the United States

OCTOBER TERM 1945.

No. .....

MAX D. GUSTIN,
Administrator of the Estate of
WILLIAM DUNCAN GRAHAM,
deceased,
Petitioner,

vs.

SUN LIFE ASSURANCE COMPANY OF CANADA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS OF THE COURTS BELOW.

There are two opinions of the Circuit Court of Appeals and two memorandum opinions of the District Court. These are, in chronological order:

(a) Opinion of the District Court entered July 28, 1944 (R. 115). This opinion grants summary judgment to the defendant below and denies it to the plaintiff below.

(b) Memorandum opinion of the District Court overruling plaintiff's motion for a new trial (R. 119), filed October 3, 1944.

(c) Opinion of the Circuit Court of Appeals affirming the judgment below upon the authority of *Johnson v. Penn Mutual Life Insurance Co.*, an unreported Ohio decision, entered December 13, 1945 (R. 131), reported in 152 F. (2d) 447.

(d) Memorandum opinion of the Circuit Court of Appeals for the Sixth Circuit denying a petition for rehearing, entered March 25, 1946 (R. 144). In this opinion the Circuit Court of Appeals for the first time adverts to its reliance upon an unreported Ohio opinion—the present issue.

II.

JURISDICTION.

Review is sought of the judgment of the Circuit Court of Appeals for the Sixth Circuit entered on December 13, 1945. Review is sought under Section 240 of the Judicial Code, Title 28, Section 347, U. S. C. A.

It is believed that *West v. American Telephone & Telegraph Co.*, 311 U. S. 223, 85 L. Ed. 139, 61 S. Ct. 179, supports the right of this Court to grant certiorari.

III.

SPECIFICATIONS OF ERROR.

The District Court erred:

(1) In granting summary judgment to the respondent and in failing to grant it to the petitioner.

The Circuit Court of Appeals erred:

(1) In relying upon an unofficial Ohio decision and affirming the judgment of the District Court.

IV.

STATEMENT OF THE CASE.

A statement of the facts of the case is included in the preceding petition under Section I thereof. To avoid repetition it is hereby adopted and made a part of this brief.

In summary, however, suit was brought by petitioner to recover benefits due under a life insurance policy. At the death of the insured, premiums were in default. Under the policy, nevertheless, the insurance continued in force for a period of time determined by the amount of cash

surrender value less loans on the policy and interest on those loans. If such interest was merely simple, and not compound, then the period of extended insurance continued to the date of death of the insured.

If however, compound interest were charged,—the extended insurance expired before the death of the policyholder.

The policy itself gave the insured the right to borrow at "six per cent per annum." The agreements he signed when he actually did borrow called for compound interest.

Summary judgment was granted to the insurance company by the District Court and affirmed by the Circuit Court of Appeals. Both declared that the insurance company could compound the interest. The Circuit Court of Appeals however reached this conclusion solely through reliance upon an unofficial Ohio case.

V.

ARGUMENT.

Summary of Argument.

As is clear from the opinion of the Circuit Court of Appeals, the general law of Ohio and the construction of the policy ordinarily would require the application of simple interest instead of compound interest. For this conclusion, it seems unnecessary to elaborate the opinion of the lower Court. (R. 131, 152 Fed. (2d), 447.)

The present discussion will show that the Circuit Court of Appeals improperly relied upon a decision of an intermediate Ohio Court which was not officially reported. The argument, therefore, can be outlined as follows:

(1) An examination of the opinion of the Circuit Court of Appeals.

(2) The words of the Ohio statute forbidding reliance upon an unreported case.

(3) Discussion of the cases construing the Ohio statute.

(a) The Decision of the Court of Appeals.

On December 13, 1945, the Circuit Court of Appeals for the Sixth Circuit affirmed the judgment below. (R. 129.) In its opinion (152 F. (2d) 447 at 451) the Court said:

> "While there is no decision of the Supreme Court of Ohio in a case substantially similar to this, we think the Ohio decisions, construed together with the applicable statutes, call for reversal of the judgment." (R. 137.)

Concluding that the Ohio law and statutes called for a reversal of the judgment, the Court then turned to the cases cited by the appellee insurance company, and said, p. 451:

> "The Ohio decisions relied on by the insurance company, with one exception, we view as not being in point upon the controlling question, which concerns the precise terms of the contract entered into by the parties. The exception is the unreported decision of the Court of Appeals of Cuyahoga County, Ohio, in *Johnson v. Penn Mutual Life Ins. Co.*, cause No. 455,583 in the Court of Common Pleas of Cuyahoga County, and cause No. 17,113 in the Court of Appeals of Cuyahoga County. The case was taken to the Supreme Court of Ohio on motion to certify the record, and also by filing an appeal as of right, upon the ground that a debatable constitutional question was involved. The motion to certify the record was overruled, and the appeal filed as of right was dismissed. 136 Ohio St. 39, 23 N. E. 2d 501. Under the principles declared in *West v. American Telephone & Telegraph Co.*, 311 U. S. 223, 61 S. Ct. 179, 85 L. Ed. 139, 132 A. L. R. 956, this decision of the inferior state court is binding upon the federal court. If it squarely determines the controlling question in the instant case, we follow it regardless of the logic of the considerations heretofore expressed." (R. 137.)

The Court thereupon decided that the *Johnson* case could not be distinguished. Its decision was held to be controlling and the judgment was affirmed. Quite obviously,

if the *Johnson* case is improper authority for determining the law of Ohio, the judgment should have been reversed.

We shall now demonstrate that it is such improper authority.

(b) The Statute Forbidding Reliance Upon the Johnson Case.

The Ohio General Code, Section 1483, provides for the reporting officially of the decisions of the courts of Ohio, including the Court of Appeals—(the intermediate appellate court under the Ohio judicial system). This Section of the Code (printed in full in the Appendix to this brief) reads, in part, as follows:

> "* * * Only such cases as are hereafter reported in accordance with the provisions of this section shall be recognized by and receive the official sanction of any court within the state."

It is clear that the case of *Johnson v. Penn Mutual Life Insurance Co.*, relied upon exclusively by the Circuit Court of Appeals, not being officially reported in accordance with the section of the Ohio Code just quoted, cannot constitute a statement of the law of Ohio. It remains only to be seen whether or not this statutory prohibition has in any way been modified or vitiated by judicial construction.

(c) The Cases Construing the Statute.

In summary, examination of the Ohio decisions discloses the following facts:

(1) The Ohio Supreme Court has never construed Section 1483, General Code.

(2) The only Ohio decision upon the statute itself is *Bevan v. Century Realty Co.*, 64 Ohio App. 58, a decision of the Court of Appeals for the Seventh Appellate District. Appeal Dismissed 136 O. S. 549. In this case, an officially reported decision, the statute was construed and held to mean what it says—that a case not officially reported cannot be recognized.

(3) Without discussing the statute, the Ohio Supreme Court has referred in various cases to unofficially reported decisions. Yet none of these cases actually rules upon the meaning of the statute.

We shall develop these points in order.

First: The state Supreme Court has never construed Section 1483, Ohio General Code. This is recognized in the memorandum of opinion of the Circuit Court of Appeals entered March 26, 1946 (R. 145). The Court there states:

> "• • • Section 1483, which relates to the reporting of decisions in the Supreme Court of Ohio and the various courts of appeals, contains a provision that 'Only such cases as are hereafter reported in accordance with the provisions of this section shall be recognized by and receive the official sanction of any court within the state.' *This section has never been construed by the Supreme Court of Ohio* • • •" (Emphasis supplied.)

Second: The only Ohio case construing the statute is the case of *Bevan v. Century Realty Co., supra.*

The Ohio Constitution, Article IV, Section 3, provides that:

> "• • • whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination. • • •"

In the *Bevan* case the judges of one Court of Appeals of Ohio were asked to certify their judgment as in conflict with the judgment of another Court of Appeals of Ohio. In refusing to certify, the court held:

> "*By the Court.* We are asked to certify this case to the Supreme Court because of alleged conflict with the conclusion of the Court of Appeals of the Eighth Appellate District in a case of *Kasunic, Admr., v. Euclid East Seventeenth Street Co.,* reported in 32 O. L. R., 261. While there is some difference in the

facts, our conclusions are not in accord. However, as we view it, there are two reasons why the motion should be, and is, denied:

"First: We followed the decisions of the Supreme Court cited in the original opinion, and, even if another Court of Appeals does not see fit to follow such decisions, it would be vain to sustain a motion which would require the Supreme Court to restate the law.

"*Second: Under the concluding sentence of Section 1483, General Code, recognition and sanction are not to be accorded to unofficially reported decisions.*" (Emphasis supplied.)

There is no other interpretation of this statute in the case law of Ohio. Therefore, it would seem that the Circuit Court of Appeals, in applying General Code, Section 1483, is bound by the interpretation given it by the Ohio Court in the *Bevan* case. *West v. American Telephone & Telegraph, supra.*

Third: In the memorandum opinion of the Circuit Court of Appeals entered March 25, 1946 (R. 147) the Court mentions cases where the state Supreme Court referred to *unreported* cases from the lower courts. For example, *Bauer v. Grinstead,* 142 O. S. 56.

However, in no case in the state Supreme Court, including the cases referred to in the opinion of the Circuit Court of Appeals, has the construction of Section 1483, Ohio General Code, been actually undertaken. In no case does it appear that the question was ever raised or assigned as error. Had the statute ever been in issue, surely the Supreme Court of Ohio would have mentioned it in its opinions. Thus these cases can scarcely be of any weight in determining the construction of Section 1483.

The case of *Bevan v. Century Realty Co., supra,* remains the only Ohio authority construing Section 1483, Ohio General Code.

The Circuit Court of Appeals in its memorandum opinion dismissing the petition for rehearing also relied upon

Bumiller v. Walker, 95 O. S. 344. Regarding this case, the Circuit Court of Appeals said (R. 147):

> "• • • The Supreme Court [of Ohio] also recognizes and gives official sanction to its own unreported cases. As stated in *Bumiller v. Walker,* 95 Ohio St. 344, 351, 'Ordinarily this court does not regard its unreported cases as judicial authority, for the reason that it is generally impossible to ascertain the concrete legal propositions involved and decided; but where a single question was involved, and that succinctly stated and decided, it cannot be said that such unreported case is wholly without influence.' While this decision was announced prior to the enactment of Section 1483, the rule as to unreported cases has never been modified or limited."

The foregoing statement of the Circuit Court of Appeals, that "the rule as to unreported cases has never been modified or limited," is completely in error. It has been and is modified by the subsequent passage of Section 1483, General Code.

Thus in no Ohio case, except the *Bevan* case, *supra,* is there any decision of the meaning and effect of Section 1483, Ohio General Code. The *Bevan* case held that the requirements of Section 1483, Ohio General Code, are mandatory.

The Circuit Court of Appeals has failed to follow the only Ohio decision construing this Ohio statute. Had it properly followed the *Bevan* case it would have been forced to discard the authority upon which it relied. By the words of its own opinion the Circuit Court of Appeals would have then reversed, rather than affirmed the judgment.

(d) Reasons for the Issuance of the Writ.

In every Ohio case decided by a Federal Court of original or appellate jurisdiction, the interpretation of Ohio law is almost invariably a crucial question. It has been held in the *West vs. American Telephone & Telegraph Co.*

supra, that the decisions of intermediate appellate courts in Ohio must be taken in the absence of a decision of the Supreme Court of Ohio, as the law of Ohio. There are, however, thousands of unofficial cases decided by Ohio intermediate courts. Are these decisions to be taken as authority by a Federal court, when their authority is specifically repudiated by statute?

It is submitted that it is a matter of grave concern to the Federal judicial system whether the decision of the Circuit Court of Appeals concerning the determination of Ohio law is or is not to be followed in the future.

Respectfully submitted,

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